

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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HANS SCHWARTZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division

FILED

APR - 9 1941

PAUL P. O'BRIEN,

CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

O'CONNOR, GRAY & STROCK,

By WILLIAM V. O'CONNOR, Esq.,

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Los Angeles, California.

For Appellee:

WM. FLEET PALMER

United States Attorney

United States Post Office

and Courthouse Bldg.,

Los Angeles, California. [1\*]

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\*Page numbering appearing at foot of page of original certified  
Transcript of Record.

In the United States District Court, Southern  
District of California, Central Division  
No. 246-P-69220

In the Matter of the Petition of

HANS SCHWARTZ, to be admitted a citizen  
of the United States of America.

### AGREED STATEMENT ON APPEAL

In accordance with Rule 76 of the Rules of Civil Procedure the parties hereby agree upon the following statement of facts and submit the same to the Circuit Court of Appeals for determination of the points in controversy hereinafter specified.

The facts essential to a decision of the questions involved by the Circuit Court of Appeals are as follows:

The appellant, a native of Austria, came to the United States of America and was lawfully admitted for permanent residence on the 20th day of October, 1933. He filed his Declaration of Intention to become a citizen of the United States on the 14th day of April, 1934, in the United States District Court for the Southern District [2] of California, Central Division, at Los Angeles, California. Following the lawful admission on the 20th day of October, 1933, the appellant resided in the United States until the 15th day of January, 1936, at which time he departed from the United States for England. The appellant was then under contract as a motion picture director with the United



Artists Corporation, a California corporation, and was proceeding abroad solely in the employment of said corporation. This corporation was then engaged in the production and distribution of motion pictures in the United States and in foreign countries. Prior to his departure at that time the appellant applied for and secured, on the 18th day of December, 1935, from the Commissioner of Immigration and Naturalization, a permit to reenter the United States under the provisions of Section 10 of the Immigration Act of 1924.

On the 12th day of May, 1936, while the appellant was in London, England, engaged in the production of a motion picture for the United Artists Corporation, he communicated with the Commissioner of Immigration and Naturalization, Washington, D. C., requesting an extension of six months within which to return to the United States, reciting in the said communication that he did not desire to lose the benefits accruing to him under his Declaration of Intention, and stating further that he was unable to complete the work on the motion picture that he was [3] directing unless the said extension were granted. This request was made in order to preserve the continuity of the appellant's residence in the United States for naturalization purposes. On the 3rd day of July, 1936, the appellant received a reply to his communication, signed by the Assistant Commissioner of Immigration and Naturalization, enclosing a self-explanatory form with reference to the general residence requirements

of the naturalization laws, together with a copy of the Act of Congress effective June 25, 1936. The Commissioner further advised the appellant in the said letter that the matter of whether or not an absence had broken the continuity of his residence for naturalization purposes was determined only at the time the application for naturalization comes up for hearing.

The appellant remained in London, England, and in the employment of the said United Artists Corporation until the 20th day of September, 1937, when he was readmitted to the United States through the Port of New York, New York.

On the 12th day of June, 1939, the appellant made formal application for the benefits of the Act of June 25, 1936, and executed Form 2363, prescribed by the Secretary of Labor for making application for the benefits of that Act. On the 31st day of October, 1939, the appellant filed his petition for naturalization in the [4] United States District Court, Southern District of California, Central Division, at Los Angeles, California. The Naturalization Examiner designated by the said Court under the provisions of the 14th subdivision to Section 4, approved June 29, 1907, submitted the petition of the appellant without recommendation for the consideration of the District Court of the United States, Southern District of California, Central Division.

On the 20th of December, 1939, the Secretary of Labor concluded that the appellant "was employed

by an American corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, and that his absence from the United States from January, 1936 to September 1937, was to be engaged in the development of such foreign trade and commerce." The Secretary of Labor, however, expressed no opinion as to whether or not the appellant had filed an application and moved to claim the benefits of the Act of June 25, 1936, within the time limit required by said Act. The determination of that question was left to the District Court of the United States.

After filing said Declaration of Intention the appellant was absent from the United States from the 15th day of January, 1936 until the 20th day of September, 1937, or a period of one year, eight months and five days. The appellant was out of the United States since the Act [5] of June 25, 1936, a period of one year, two months and twenty-five days.

On the 13th day of June, 1940, counsel for the appellant, Hon. J. F. T. O'Connor, and Bruce G. Barber, Naturalization Examiner, signed a stipulation of facts and submitted the questions in controversy on briefs to the District Court of the United States, Southern District of California, Central Division, Hon. Ralph E. Jenney, Judge.

On the 15th day of August, 1940, the Hon. Ralph E. Jenney, United States District Judge, rendered his decision, denying to the appellant the benefits of the Act of June 25, 1936.

A concise statement of the points to be relied upon by the appellant, and upon which the decision of the appellate court is asked, is as follows:

(1) Whether an alien who was abroad when the Act of June 25, 1936 became law may apply for the benefits of that Act upon his return to the United States regardless of when that return took place; and

(2) Whether an application for the benefits of the Act of June 25, 1936, could be filed after that Act had been repealed in part by the subsequent resolution of Congress dated June 29, 1938; and

(3) Whether under the Act of June 25, 1936, and under the resolution of June 29, 1938, the continuity [6] of the appellant's residence within the United States of America for naturalization purposes was broken by absence from the United States from January 15, 1936 to September 20, 1937.

A copy of the Judgment rendered by the District Court of the United States in and for the Southern District of California, Central Division, by Hon. Ralph E. Jenney, District Judge, is attached hereto and made a part of this agreed statement and marked "Exhibit I".

A copy of the Notice of Appeal with its filing date, is attached hereto and made a part of this agreed statement and marked "Exhibit II".

Copies of Orders extending time within which to file the record and docket the cause in the United States Circuit Court of Appeals are attached hereto

and made a part of this agreed statement and marked "Exhibit III".

A statement of the points upon which the appellant relies on appeal is attached hereto and made a part of this agreed statement, and marked "Exhibit IV".

Dated this 19th day of February, 1941.

In the absence of Judge Jenney on account of illness, Approved by:

H. W. HOLLZER,

Judge of the United States District Court, Southern District of California, Central Division.

O'CONNOR, GRAY & STROCK

By WILLIAM J. O'CONNOR

Attorneys for Appellant

WM. FLEET PALMER,

U. S. Atty.

RUSSELL K. LAMBEAU,

Asst. U. S. Atty.

Attorneys for Respondent [7]

**"EXHIBIT I"**

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 246-P-69220

In the Matter of the Petition of

**HANS SCHWARZ**

To be Admitted a Citizen of the  
United States of America.



MEMORANDUM DECISION  
APPEARANCES:

For the Petitioner,

J. T. F. O'CONNOR, Esq.,  
624 Security Title Ins. Bldg.,  
530 West Sixth Street,  
Los Angeles, California.

For the Government,

BRUCE G. BARBER,  
Naturalization Examiner,  
1307 Federal Building,  
Los Angeles, California.

Jenney, District Judge.

The petition of Hans Schwarz for admission to citizenship in the United States was submitted, after a hearing in open court, upon a stipulation of facts.

The agreed and material facts are as follows: Petitioner, a native of Austria, came to the United States and was lawfully admitted for permanent residence on October 20, 1933. He filed his declaration of intention on April 14, 1934. On December 18, 1935, the Commissioner of Immigration and Naturalization granted petitioner a re-entry permit for one year, and on January 15, 1936, petitioner departed for England. He was then under contract as a motion [8] picture director with the United Artists Corporation of Hollywood and was going abroad solely in the employ of that corporation.

This corporation was then engaged in the production and distribution of motion pictures in the United States and abroad.

On May 12, 1936, petitioner wrote from London to the Commissioner of Immigration and Naturalization, stating that he must, in order not to lose the benefits accruing to him under his declaration of intention, return to the United States before June 18, 1936, but that he would be unable to complete work on the picture he was directing until after that date. He therefore requested an extension of six months within which to return. On July 3, 1936, an assistant to the Commissioner of Immigration and Naturalization answered petitioner's letter, enclosing a self-explanatory form and directing his attention to the second paragraph thereof, setting forth the general residence requirements of the naturalization laws. This assistant also enclosed with his letter a copy of the Act effective June 25, 1936, amending residence requirements of the naturalization laws. He then advised Mr. Schwarz that the matter of whether or no an absence had broken the continuity of residence, for naturalization purposes, is determined only at the time the application for naturalization comes up for hearing. [9]

Petitioner returned to the United States on September 20, 1937. He had been out of the United States one year, eight months and five days, and out of the United States, since the June 25, 1936 amendment, one year, two months and twenty-five days. It was not until June 12, 1939 that any for-

mal application was made for the benefits of the Act of June 25, 1936, at which time the petitioner executed Form 2363 prescribed by the Secretary of Labor for making application for the benefits of that act. On October 31, 1939, petitioner filed his petition for naturalization. On December 20, 1939, the Secretary of Labor in her decision concluded that petitioner "was employed by an American corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, and that his absence from the United States from January 1936 to September 1937, was to be engaged in the development of such foreign trade and commerce." The Secretary of Labor, however, expressed no opinion as to whether or not petitioner had filed an application and moved to claim the benefits of the act of June 25, 1936, within the time limit required by that act. The decision stated that determination of that question was to be left to the court which might hear Schwarz' petition for naturalization.

The last sentence of the second paragraph of the [10] fourth subdivision of section 4 of the Naturalization Act of June 29, 1906 (8 USCA, Sec. 382), as amended March 2, 1929, provided that:

"Absence from the United States for a continuous period of one year or more during the period immediately preceding the date of filing the petition for citizenship for which continuous residence is required as a condition precedent to admission to citizenship shall break the continuity of such residence."



The above quoted language was not disturbed by amendment of June 25, 1936. This amendment merely struck out the period after the word "residence" at the end of the above quoted language, and inserted a comma in lieu thereof. There was then added an exception applying to an alien declarant for citizenship, employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Secretary of Labor, or employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States or a subsidiary thereof.

When this said second paragraph of the fourth subdivision of said section 4 was amended on June 29, 1938, the portion of said section, above quoted, was reframed to [11] read as follows, (emphasis and brackets are ours—the underscored words being new and the words in brackets having been omitted) :—

“Absence from the United States for a continuous period of one year or more during the period *for which continuous residence is required for admission to citizenship* immediately preceding the date of filing the petition for (citizenship for which continuous residence is required as a condition precedent to admission to citizenship) *naturalization or during the period between the date of filing the petition*

*and the date of final hearing shall break the continuity of such residence, \* \* \**” [Italics are by the court.]

It will be noted that, except for the inclusion of the language with respect to the period between the date of filing the petition and the date of final hearing (which does not concern Mr. Schwarz), the above indicated portion of the act has merely been recast.

Furthermore, the 1938 amendment of the language of the exception added by the 1936 amendment does not in any way affect Mr. Schwarz. Thus, whether we apply the 1936 or the 1938 exception to Mr. Schwarz, the result is the same.

When Mr. Schwarz left the United States on January 15, 1936, he knew he would have to be back in the United States within one year, unless he was to lose the benefits accruing to him under his declaration of intention. And if he had returned on or before January 14, 1937, he would never have had to concern himself with the requirements of the 1936 amendment.

Furthermore, Section 2 of the 1936 act provides that no period of residence outside the United States, during the five years immediately preceding the date of enactment of that act (June 25, 1936), shall be held to have broken the continuity of residence if the alien can bring himself within the provisions of said Section 2. Mr. Schwarz has satisfied the Secretary of Labor and the court, with respect to the period prior to June 25, 1936, (and

there is no time limitation as to when he should so satisfy them) and he would have had until June 25, 1937, under the language preceding the exception, hereinabove quoted and discussed, to return to the United States.

An alien is offered under certain definite conditions the privilege of citizenship by virtue of specific acts of Congress. The Constitution does not confer the right to naturalization. It merely authorizes the Congress to establish a uniform rule therefor. Art. 1, Sec. 8, Clause 4. The opportunity having been conferred by the Naturalization Act and acts amendatory thereof, the alien may accept the offer and become a citizen upon [13] compliance with the prescribed conditions, but not otherwise. Title 8 U. S. C. A. Sec. 372. His claim is of favor, not of right. There is no such thing as the "right to naturalization," and an applicant for this high privilege must conform strictly to the terms alone upon which the right he seeks can be conferred. *Tutun v. U. S.*, 270 U. S. 568, 578; *U. S. v. Ginsberg*, 243 U. S. 472, 475; *Luria v. U. S.*, 231 U. S. 9, 22.

The 1936 amendment is only an exception to, and not a limitation upon, the language preceding the exception. Thus Mr. Schwarz had until June 25, 1937 to satisfy the Secretary of Labor, during which time, to wit: from June 25, 1936 to June 25, 1937, he was absent from the United States under the provisions of the law preceding the exception. If the Secretary of Labor did not indicate her sat-

isfaction in a timely manner, Mr. Schwarz could have returned to the United States before June 25, 1937, and he would never have come under the provisions of the exception.

This construction of the 1936 act is reinforced by the language of the savings clause of the 1938 amendment, to wit:

“This amendment shall not affect cases of aliens who prior to the date of its enactment have established to the satisfaction of the Secretary of Labor, pursuant to an Act en- [14] titled ‘An act to amend the naturalization laws in respect of residence requirements, and for other purposes’, approved June 25, 1936, that absence from the United States was to be or had been for the purpose of carrying on activities described therein,”

which infers that all who were affected by the 1936 amendment had already satisfied the Secretary of Labor and would not be required to do so again because of the 1938 amendment.

We regret that we are unable to entirely follow the Zaoral case, No. 172440, D. C., No. D. of Ill., E. D., the only case cited by petitioner.

The petition is denied.

RALPH E. JENNEY

United States District Judge

Dated: August 15, 1940. [15]

“EXHIBIT II”

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Hans Schwartz, petitioner above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on August 15, 1940.

(signed) J. F. T. O’CONNOR

Attorney for appellant,  
Hans Schwartz,  
530 West Sixth Street  
Los Angeles, California

Filing Date: November 13, 1940. [16]

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“EXHIBIT III”

[Title of District Court and Cause.]

ORDER FOR EXTENSION OF TIME

Good cause appearing, it is ordered:

That the time to file the record and docket the cause in the United States Circuit Court of Appeals be, and the same is hereby, extended to and including the 11th day of February, 1941.

BEN HARRISON

United States District Judge

[17]

## “EXHIBIT III”

[Title of District Court and Cause.]

## ORDER FOR EXTENSION OF TIME

Good cause appearing, it is ordered:

That the time to file the record and docket the cause in the United States Circuit Court of Appeals be, and the same is hereby, extended to and including the 21st day of February, 1941.

HARRY A. HOLLZER

United States District Judge

[18]

## “EXHIBIT IV”

The following is a

## CONCISE STATEMENT OF THE POINTS

to be relied upon by the appellant and which is submitted to the United States Circuit Court of Appeals for determination.

(1) Whether an alien who was abroad when the Act of June 25, 1936 became law may apply for the benefits of that Act upon his return to the United States regardless of when that return took place; and

(2) Whether an application for the benefits of the Act of June 25, 1936, could be filed after that Act had been repealed in part by the subsequent resolution of Congress dated June 29, 1938; and

(3) Whether under the Act of June 25, 1936, and under the resolution of June 29, 1938, the con-



tinuity of the appellant's residence within the United States of America for naturalization purposes was broken by absence from the United States from January 15, 1936 to September 20, 1937.

WILLIAM V. O'CONNOR

Attorney for Appellant

[Endorsed]: Filed Feb. 19, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy. [19]

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages, numbered from 1 to 19, inclusive, contain original Agreed Statement on Appeal, which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$0.95, and that said amount has been paid me by the Appellant herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 21st day of February, A. D. 1941.

[Seal]

R. S. ZIMMERMAN,  
Clerk.

By EDMUND L. SMITH,  
Deputy Clerk.

[Endorsed]: No. 9760. United States Circuit Court of Appeals for the Ninth Circuit. Hans Schwartz, Appellant, vs. United States of America, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed: February 21, 1941.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit  
No. 9760

HANS SCHWARTZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND PORTIONS  
OF RECORD RELIED UPON

In accordance with Rule 19 of the Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit, Subdivision 6, the appellant herewith files a concise statement of the points upon which he intends to rely on the appeal and designates the parts of the record which he thinks necessary for the consideration thereof:



(1) Whether an alien who was abroad when the Act of June 25, 1936 became law may apply for the benefits of that Act upon his return to the United States regardless of when that return took place; and

(2) Whether an application for the benefits of the Act of June 25, 1936, could be filed after that Act had been repealed in part by the subsequent resolution of Congress dated June 29, 1938; and

(3) Whether under the Act of June 25, 1936, and under the resolution of June 29, 1938, the continuity of the appellant's residence within the United States of America for naturalization purposes was broken by absence from the United States from January 15, 1936 to September 20, 1937.

The parts of the record which the appellant deems necessary for the consideration of the statement of points are as follows:

The appellant designates the entire record in this case as necessary for consideration of the statement of points, and designates for printing the entire agreed statement on appeal.

Dated: Los Angeles, California, March 11, 1941.

O'CONNOR, GRAY & STROCK

Attorneys for Appellant

By WILLIAM V. O'CONNOR

Received copy of the within Statement of Points and Portions of Record Relied Upon this 11th day of March, 1941.

[Illegible]

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Attorney for Appellee,  
United States of America.

[Endorsed]: Filed March 12, 1941. Paul P.  
O'Brien, Clerk.